LERA 3156

Date: 19990118

IN THE PROVINCIAL COURT OF MANITOBA

The Honorable Judge Robert L. Kopstein

In The Matter Of: An application pursuant to Section 13 (2) (a) of ***The Law Enforcement Review Act***, R.S.M. 1987, c L75

BETWEEN:

M. P.	)	M. P. ,
Complainant/Applicant	)	The Applicant
	)	
- and -	)	
	)	
CONSTABLE C. L.	)	Paul R. McKenna
and	)	for the Respondents
CONSTABLE R. H.	)	
Respondents	)	
	)	Judgment Delivered:
	)	January 18th, 1999.

Applicant's Complaint and L.E.R.A Disposition

[1] By letter dated March 12, 1997, stamped as hand delivered to the Law Enforcement Review Agency on May 28, 1997, the Applicant lodged a complaint concerning the conduct of the Respondents on March 8, 1997 at 4:30 A.M.

[2] Following an investigation of the complaint, the Commissioner of the Law Enforcement Review Agency wrote to the applicant on May 14, 1998 informing him, *inter alia*, that pursuant to section 13 (1)(a) of the Act, the investigation had been terminated. It is a three-page letter. I quote the portions thereof which appear relevant to this review:

"According to your letter this incident began around 0400 hrs, on March 8th when two Winnipeg Police Officers forced their way into X BUSINESS after you had informed them the premises were closed. As a result of their actions, you have made the following allegations of misconduct.

1 - Illegal search of the building without a warrant.
2 - Harassment on the part of the two officers.
3 - Arrested without being given your rights.
4 - Not allowed to exercise your right to call a lawyer.

"You also provided statements from patrons who were in the premises at the time.....

"My investigator, Mr. F. has obtained copies of the police report, member notebooks and has interviewed the two officers. As a result we have learned that officers were in the neighbourhood at that time and date in response to a complaint of three men having been seen armed with shotguns. Not being successful in locating the individuals, they happened upon your restaurant and, to ensure the suspects were not inside with your clientele, decided to make some inquiries with you. I will point out, however, that when officers looked in the window they saw beer bottles on the tables where some patrons were seated and also observed others standing at the bar holding on to bottles of beer. For your information the officers had the authority to enter and search your premises under two statutes.

The letter then quotes the provisions of Section 101(1) of ***The Criminal Code*** (in my opinion, incorrectly in the circumstances, but that is of no moment here) and Sections 138 and 139 of the ***Liquor Control Act***. He then continues:

"The officer's notes clearly state that beer bottles were observed on tables and the bar counter. Furthermore while you and your employees obstructed the officers' movements albeit momentarily, this allowed the contents of some of the bottles to be poured out. Police did manage to seize three open and 'cold' bottles of beer from the bar area. When you were arrested you were informed of the reason and you were permitted to phone a lawyer before being escorted to District #2 station. It is standard procedure to read a person his/her 'rights' under the ***Charter*** upon arrest which also includes information on the right to counsel.

"From my review of the investigative file I find the police officers were operating within the law when they 'forced' their way in and subsequently searched P. 's Licensed Premises during which time

you and two employees chose to obstruct them while they were carrying out their duties.....

"Therefore Mr. P. I cannot support any of the allegations and this is to inform you that the investigation has been terminated pursuant to Section 13(1) of the ***Law Enforcement Review Act***."

The Present Application

[3] Pursuant to section 13 (2) of the Act, the Applicant applied to the Commissioner to have the decision reviewed by a provincial judge.

[4] Submissions were made before me on November 20, 1998.

The Issues

[5] The issues are whether the Commissioner erred in declining to take further action on the complaint, and if so, what action by the provincial judge is appropriate.

The Law Enforcement Review Act

[6] The provisions of the Act relevant to this review are as follows:

2 (1) The Lieutenant Governor in Council shall appoint a Commissioner.

2(2) The Commissioner has such powers and shall carry out such duties and functions as conferred or imposed under this Act or as may be required for purposes of this Act by the Lieutenant Governor in Council.

13 (1) Where the Commissioner is satisfied

(a) that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29;

(b) that a complaint has been abandoned; or

(c) that there is insufficient evidence supporting the complaint to justify a public hearing;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the

respondent's Chief of Police of his or her reasons for declining to take further action.

13 (1.1) . . .

13 (2) Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1.1), apply to the Commissioner to have the decision reviewed by a provincial judge.

13 (3) On receiving an application under subsection (2), the Commissioner shall refer the complaint to a provincial judge who, after hearing any submissions from the parties in support of or in opposition to the application, and if satisfied that the Commissioner erred in declining to take further action on the complaint, shall order the Commissioner

(a) to refer the complaint for a hearing; or

(b) to take such other action under this Act respecting the complaint as the provincial judge directs.

13 (4) Where an application is brought under subsection (2), the burden of proof is on the complainant to show that the Commissioner erred in declining to take further action on the complaint.

13(4.1) Notwithstanding that all or part of a hearing under this section is public, the provincial judge hearing the matter shall, unless satisfied that such an order would be ineffectual,

(a) order that no person shall cause the respondent's name to be published in a newspaper or other periodical publication, or broadcast on radio or television, until the judge has determined the merits of the application;

(b) if the application is dismissed, order that the ban on publication of the respondent's name continue; and

(c) if the application is successful, order that the ban on publication of the respondent's name continue until the complaint has been disposed of in accordance with this Act.

15 (1) Where the investigation has been completed, the Commissioner shall consult with the complainant, the respondent and the respondent's Chief of Police for the purpose of resolving the complaint informally.

17 (1) The Commissioner shall refer a complaint to a provincial judge for a hearing on the merits of the complaint when

(a) a provincial judge has under section 13 ordered the Commissioner to refer the complaint for a hearing; or

(b) disposition of the complaint within the terms of section 15 or 16 is not possible.

Discipline Code (Relevant portion)

29. A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

(i) making an arrest without reasonable or probable grounds,

(ii) using unnecessary violence or excessive force,

(iii) using oppressive or abusive conduct or language,

(iv) being discourteous or uncivil.

The Liquor Control Act

68 (1) No liquor shall be sold in a dining room from 2:00 a.m. until 11:00 a.m. on any day.....

138 (1) Any constable or inspector may, at any reasonable time, enter upon any premises in respect of which a license or permit has been issued or.....and there conduct an inspection to ensure that the provisions of this Act and the regulations and the terms and conditions of the license or permit.....are being complied with.

Evidence before the Acting Commissioner

[7] As stated, the complaint lodged pursuant to ***The Law Enforcement Review Act*** related to an incident at 4:30 a.m. on March 8th 1997.

Complainant's Evidence

[8] The principal evidence of the applicant is contained in his letter of complaint dated March 12, 1997. It is endorsed by the signatures of four witnesses.

[9] His letter says that when police came to the door he told them he was closed for the night but they entered by force, while seven persons were there eating pizza.

[10] Displaying police badges, he says, they conducted an illegal search throughout the building, first his ice cream freezer, and then, around his cash register. They disturbed items on his counter by lifting boxes, "etc."

[11] The officer who had shoved him at the doorway then went behind the counter where empty beer bottles were kept. Some still contained beer which had not been fully consumed.

[12] He states: "We take all bottles off the tables, finished or not, at 2:30 a.m." He says the officer stated there was still beer in the bottles. The complainant asserts that those bottles were behind the counter, nowhere near the tables.

[13] He says that he had a large amount of cash on his person, that being the receipts of his businesses. The cash had not as yet been deposited. At the police station, after being arrested and taken into custody and searched, the police told him or suggested to him that the money was received from an unlawful source.

[14] That allegation, I assume, is one of the alleged events leading to the complaint of harassment. The other element of harassment alleged by the applicant relates to the treatment he and others in his premises received at the hands of the police.

[15] A letter from one of the witnesses, D. M. , states that he had known the complainant before the complainant opened the restaurant and was not required to leave at the 4:00 a.m. closing time. A few other people also remained drinking coffee or soda.

[16] He says he saw the officer who pushed past the applicant, go behind the counter, pick up a couple of beer bottles and say he was charging the restaurant with serving beer after hours.

[17] A further witness, D. H. wrote that he and others were all eating their meals when the officers forced their way in pushing past the applicant and going behind the main counter where alcohol was stored, claiming there was open alcohol; alcohol which he says was "in no contact with the customers".

[18] M. T. , another witness, wrote that at approximately 4:20 a.m. he was finishing his pizza and coffee when police knocked at the door. He says P. went to open the door and the next thing this witness knew, a police officer was "roughing up Mr. P. " in trying to make his way into the restaurant. A search proceeded. The police turned over boxes, kicked chairs and broke glasses. He says there was no alcohol on any table or on the counter. They did find a few empty beer bottles behind the counter. More officers, he says, came and continued to rough up P. and other customers. The police took P. and two others away, leaving those in the restaurant to close the premises.

Police Evidence

[19] An unsigned document bearing the heading "Narrative", bearing the date and time: 1997 07 24 13:15:34 (which may be the date and time it was sent by facsimile transmission), and bearing the sub-heading: " .L. H. appears to be a summary, by those officers, of the incident which occurred at the applicant's premises, X ADDRESS in Winnipeg, on March 8, 1997.

[20] The document states that they had received a report, at 4:00 a.m., of three males, armed with shotguns. It appears that in the search for those males they came upon the applicant's premises in which they noticed approximately ten people. Upon knocking, the door was opened by the applicant. Police requested entry to search for the three males, but the applicant grabbed the door frame and refused the police entry."

[21] Because open liquor was observed, Constable H. notified the complainant that police would be entering and forced his way past the complainant. At this point a melee erupted with pushing, pulling and shoving

between Constable H. , the complainant and two other individuals who were on the premises.

[22] Constable H. notified the applicant that he would be charged with a breach of the Liquor Act, with obstructing a peace officer, and that he was under arrest. The applicant then stated: "I'm going to call my lawyer. Get out of here. You can't do nothing."

[23] At that point, according to the summary, Constable H. observed another individual pushing Constable L. . He assisted Constable L. He then went behind the counter and seized six open bottles of beer. At the same time he observed other individuals to be pouring beer down the drain.

[24] The complainant and three others were arrested.

[25] The Commissioner had access to the original notes of police Constables H. and L. The notes of H. generally confirm the statements contained in his report, referred to above. The notes describe, as well, the conduct of another person who was present, A. D. J. , who, when police entered, argued, pushed and swore at police, demanded badge numbers, which were provided, declined to identify herself and directed foul language at police. Told to go out to the police car she questioned, according to the notes, whether the officer wished to conduct a "strip search".

[26] According to his notes, Constable L. observed approximately ten people through the window of the restaurant. According to his notes, beer was observed "on top of the bar/counter being held by the public." The notes further describe obstructive conduct by some inmates of the establishment, attempting to prevent police access to the area where liquor was kept.

[27] The file contains copies of letters dated October 23, 1997 from the then Commissioner of L.E.R.A., Mr. Norman Ralph, addressed to Constables C. L. and P. H. requesting their presence to be interviewed by Mr. R. F. an investigator, on December 9, 1997 at 12:30 p.m. or to make alternative arrangements to meet with Mr. F. at another time in the event that they were unable to meet at the scheduled time.

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

[28] On the file, notes, without any author identification, dated 97.12.05 at 12:30 A.M. bearing the names of C. L. and P. H. , appear to be the notes of Mr. F. , the investigator, relating to his interview with the two officers. Those notes read as follows:

> "C. : In the area on an unrelated matter. Passed by and saw people in restaurant at 0430.
>
> Passed by again. Stopped and saw approx 10 people inside. Holding plastic glasses seated. Beer bottles still on tables that they were seated at.
>
> 2-3 people standing at bar holding on to beers.
>
> (Were responding to a firearms complaint and thought suspects could be those inside restaurant as no one else was seen on street or in area. Entered restaurant under suspicion there might be firearms.)
>
> Approached glass and took time to observe patrons. P. came to door and explained to him why officers were there (3 guys with shotguns). He refused. Stated not to come in without warrant. Questioned his reasoning. Advised him members would be entering, if need be, would check his liquor lic. As member moved forward P. (illegible) door and attempted to close door. Door was opened enough for C. to get in.
>
> P. : Behind C. with one foot in the door. A. D. J. came running at members. P. (illegible) to second P.C. and they pulled over to assist.
>
> C. Lots of more calling and shouting. P. now behind bar.
>
> J. preventing C. from proceeding. Was intoxicated.
>
> P takes stance between counter (bar) and fridge. Another patron believed to be manager, // S. putting beers off bar. // All the patrons were hiding (illegible) beer bottles under tables.
>
> P. then pushed C. and other patrons began coming at officer.
>
> Other members in restaurant at time called for back-up.
>
> S. grabbed C. 's arm to prevent arresting P. Advised F. he was under arrest and told why.

P. and C. went to kitchen to use phone to call his lawyer. Couldn't get anyone.

Seized 3 open (cold) beer, 2 Molson Dry 1 Labatts Light.

P. S. and J. all arrested for various offences.

In a nutshell all P. had to do was let officers search for those 3 armed suspects and none of this would have happened. The liquor violations would have been overlooked.

The main catalyst in this matter was the way J. acted and her continuous out of control behaviour.

Note: Hours to serve liquor on permit were 11 AM to 2 AM".

The Jurisprudence

[29] A review of the authorities makes it clear that only in a case in which the administrative tribunal's decision is patently unreasonable or clearly irrational may a court sitting on review consider the merits of the decision. A review conducted by a provincial judge, pursuant to Section 13 (3) of ***The Law Enforcement Review Act***, is not in the nature of an appeal of the Commissioner's decision on the merits of the case. It is, rather, a review for the limited purpose of determining whether, in arriving at his or her decision, the Commissioner acted within the jurisdiction conferred upon him or her under the Act. Procedural fairness is a necessary component of the exercise of a jurisdiction.

[30] As well, though the decisions of administrative tribunals are to be treated with considerable deference, the provincial judge must consider whether, on findings of fact, the decision of the Commissioner was patently unreasonable or irrational. Only if the provincial judge finds a jurisdictional defect or a patently unreasonable or irrational finding may he or she find that the Commissioner has erred. Only on the basis of an error so found may he or she make an order provided for in Section 13 (3) of the Act.

[31] Finally, in carrying out its task, the Court should endeavour to give effect to the intent of the legislation, and avoid narrow technical constructions. A review of the case law cited by counsel in support of those criteria is as follows:

[32] ***S.E.P.Q.A. v. Canada C.R.H.C*** (1989) 62 D.L.R. (4th) 385 (S.C.C.), dealt with a discrimination complaint under the ***Canadian Human Rights Act*** R.S.C. 1970 c. 10 (2nd Supp.). The complaint alleged a violation of Section 11 of that Act which required that male and female workers receive equal pay for work of equal value. The Commission appointed an investigator. The investigator conducted an investigation and arrived at the conclusion that existing salary disparities were not due to discrimination, but rather due to job misclassification. He provided his report to the Commission, along with his recommendation that the complaint be dismissed. Copies of the investigator's report were also sent to the parties. They were given the opportunity to make written submissions, and the complainant did so. Following the Commission's consideration of the report and submissions, it dismissed the complaint. One of the issues before the Court was the appropriate standard of justice to be observed by an administrative tribunal.

[33] At page 427 Sopinka J. said:

> "Section 36 (3) provides for two alternative courses of action upon receipt of the report. The Commission may either adopt the report 'if it is satisfied' that the complaint has been substantiated or it may dismiss the complaint 'if it is satisfied that the complaint has not been substantiated'. If the report is adopted, I presume it is intended that a tribunal will be appointed under s. 39....."

And at page 428:

> ".....Accordingly, I conclude.....it was not intended that the Commission comply with the formal rules of natural justice. In accordance with the principles in *Nicholson, supra,* however, I would supplement the statutory provisions by requiring the Commission to comply with the rules of procedural fairness."

He then quotes, with approval, the statement of Lord Denning M.R., in ***Selvarajan v. Race Relations Board*** 1976 1 All E.R. 12 (C.A.) at page 19:

> "In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. In all of these cases it has been held that the investigating body is under a duty to act fairly; but that which requires fairness depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress or in some such way adversely affected by the investigation and report, then he should be

> told of the case made against him and afforded the opportunity of answering it."

[34] In ***Wagner v. Williams*** (1995), 103 Man. R.(2d) 137 (affd. Manitoba C.A. 110 Man. R. (2d) 23; W.A.C. 23), Beard J. was called upon to review the decision of Cohan P.J. who had found that the Commissioner had not erred in declining to take further action on the applicant's complaint. In her helpful review of the law, Beard J. refers at page 146, paragraph [16] to the criteria of "natural justice or procedural fairness" as the proper standard to be applied to a review by an administrative tribunal. She refers at page 147 (paragraph [21]) to the decision of Cory J. in ***Canada (Attorney General) v. Public Service Alliance of Canada*** (1993) 1 S.C.R. 941, at pp. 961 – 962 as follows:

> "In summary, the courts have an important role to play in reviewing the decisions of specialized administrative tribunals. Indeed, judicial review has an administrative function, see ***Chevrier v. Attorney General of Quebec***, [1981] 2 S.C.R 220. In undertaking the review courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness, second, that it acted within the bounds of the jurisdiction conferred upon it by its empowering statute, and third, that the decision it reached when acting within its jurisdiction was not patently unreasonable. On this last issue, one should accord substantial deference to administrative tribunals, particularly when composed of experts operating in a sensitive area."

[35] Beard J., at paragraphs [55] and [56] (pp. 155 & 156), notes further:

> "[55] The Supreme Court of Canada has acknowledged that reviewing courts should show deference to tribunals in respect of questions of fact, even in situations where..... (see ***Bradco*** at p. 335 ***and Canada (Attorney General) v. Mossop*** [1993] 1 S,C,R, 554; 149 N.R. 1, La Forest J., at pp. 584 - 585)."

> "[56] Thus, an error of fact made by an administrative tribunal is reviewable only where the error is determined to be patently unreasonable....."

And further:

> "It is not enough that the decision of the Board is wrong in the eyes of the Court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational."

[36] In ***Re Maple Lodge Farms Ltd. and Government of Canada et al.,*** 47 D.L.R. (3rd) 558, The Supreme Court of Canada considered the administrative function of the Minister of Industry Trade and Commerce in respect of a ministerial discretion to issue certain permits under ***The Farm Products Marketing Agencies Act***, 1970-71-71 (Can), c. 65. The decision of the Court was written by McInyre J. In dealing with the proper judicial approach to reviews of administrative decisions, he says at page 562:

> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, whenever possible avoid a narrow technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with the responsibility....."

[37] See also ***Sullivan v. Canada (Human Rights Commission)***, Federal Court Judgments [1992] F.C.J No. 417 Action No. T-350-92.

Discussion

Section 15

[38] At the outset, there is no evidence on the record that the Commissioner consulted with the complainant, respondent, and the respondent's Chief of Police for the purpose of resolving the complaint informally, pursuant to the mandatory provision contained in Section 15(1) of ***Law Enforcement Review Act***. In response to my written inquiry of counsel for the Respondents in that regard, I received replies from counsel for the respondents as well as from Denis Guenette, Crown counsel. It was argued that the Law Enforcement Review Agency has the jurisdiction and power to invoke Section 13(1) without having to explore whether the parties wish to resolve the matters informally pursuant to Section 15. If that were not the case, it was

argued, the Commissioner would be bound, pursuant to Section 15(1), to seek resolution of complaints which he or she had deemed to be frivolous or vexatious, which did not fall within the ambit of Section 29, which had been abandoned by the complainant, or which were not supported by the evidence. He or she would be bound, in other words, to seek resolution of a complaint which had no substance, was unsupported by evidence or was abandoned.

[39] Counsel's argument misses the fact that the clear objective of Section 15(1), regardless of the merit of a complaint, is the avoidance, as far as is possible, of a continuing festering relationship, between civilians and police, through the Commissioner's intercession and attempt at conciliation. Even if he or she considers the complaint to be without merit, he or she is bound to use the office of Commissioner as one of conciliation.

[40] In the scheme of the Act, the provisions contained in that section are extremely important. The section creates a legislative tool designed to obviate, where possible, the more time consuming, stressful and expensive action under Section 13 (2) (if, following the commissioner's decision under Section 13 (1) not to take further action, that decision is challenged), or Section 17 (1) (referring the complaint to a provincial judge for hearing on the merits). Informal resolution saves the officer(s) the jeopardy of possible disciplinary action. Informal settlement is a result at which Section 15(1) is aimed. Even conceding, in terms of practicality that it would seem fruitless to pursue the aim of Section 15(1) in the case in which the complainant has abandoned the process, abandonment was certainly not the case here. The complaint has been pursued, aggressively by the applicant.

[41] In this case, indeed, bringing the parties together in an informal way may have resulted in such resolution. Compliance with Section 15(1), by an attempt at informal resolution, is an essential pre-condition to a declination by a Commissioner under Section 13 (1). Compliance with Section 15(1) is mandatory. For the Commissioner to ignore or bypass it is to fail to exercise an essential element of the jurisdiction conferred upon him.

Acting Commissioner

[42] In my review of the provisions of the Act, following the hearing, I also raised, with Counsel for the Respondents, an issue that appeared to be relevant to jurisdiction. Letters addressed to the Applicant from the office of the Commissioner were signed by Mr. George Wright as "Acting Commissioner" though the Act contains no provision which confers upon an Acting

Commissioner the authority to exercise the powers of the Commissioner. In response to my query of counsel in that regard, however, it was pointed out that despite the designation of "Acting Commissioner" in correspondence, Mr. Wright was, in fact, appointed as Commissioner by ***Order in Counsel 108/98*** dated March 4, 1998. It appears that he uses the title "Acting Commissioner" because his appointment is on an interim basis, but that he is fully empowered as the Commissioner.

Procedural Fairness

[43] It appears from the record that the former Commissioner communicated with the respondents for the purpose of facilitating an interview between them and the investigator. It appears, also, that the investigator did, in fact, meet with the respondents and made notes on their side of the story. The record is silent, however, upon any communication with the applicant for the same purpose. Nor is there evidence that the investigator ever spoke to the applicant or witnesses who were in attendance at the time.

[44] It is clear that the Commissioner relied, at least in part, upon the record of the interview facilitated by him between the investigator and the respondents, but that he did not have the benefit of a record of an interview with the applicant because he did not facilitate one. In principle *audi alterem partem* "hear the other side" lines one of the basic tenets of procedural fairness.

[45] There is no evidence, moreover, that the result of the investigator's interview with the two constables was ever disclosed to the applicant." Except for some statutory provisions which permit ex- party applications - the results of which are usually interim and do not deprive a party of the right to be heard on the merits of a case prior to final disposition - procedural fairness requires that both parties to a proceeding have the opportunity to hear, or in this case, read what is alleged by the other party so as to enable that other party to respond to it.

[46] In his letter of May 14th, 1998, the Commissioner says (at page 2) "....I will point out however that when the officers looked in the window they saw beer bottles on the tables where some patrons were seated and also observed others standing at the bar holding on to bottles of beer." At the bottom of the same page he refers to officers' notes which mention beer at the tables and beer at the bar. Reviewing the constables' notes, Constable H. saw numerous bottles of beer at the tables. Constable L. , however, notes beer, not at the tables, but rather on the bar/counter being held by "the public". In the

face of the applicant's denial of open liquor in either place, the Commissioner appears to have found, as a fact, that open liquor was in both places.

[47] It is not within the Commissioner's mandate under the ***Law Enforcement Review Act***, to make findings of fact on the issues in dispute between the parties. Except in the event of earlier resolution pursuant to section 15, once there are material facts in dispute arising out of the allegations of disciplinary default within the meaning of section 29 of the Act, the Commissioner must refer the complaint for hearing pursuant to section 17, regardless of his or her opinion as to which party is telling the truth. That requirement is subject only to a finding under one of the clauses of section 13(1). Clauses (a) and (b) have no application in this case. Nor, in his letter advising the applicant that he was declining to take further action, does the Commissioner rely upon one of those clauses. The penultimate paragraph of his letter of May 14, 1998 says that he cannot support any of the applicant's allegations. If that statement was his conclusion, that "there is insufficient evidence supporting the complaint to justify a public hearing", a conclusion open to him pursuant to section 31(1)(c), such conclusion in this case would clearly fly in the face of the evidence before him and is patently unreasonable. A conclusion or finding pursuant to section 31(1)(c) is available where little, if any, of the evidence before the Commissioner would support the complaint.

[48] In this case, if the only complaint had been that the search was illegal, I would think that in light of section 138 of the ***Liquor Control Act***, the Commissioner would have been correct in finding, under section 13(1)(c), that there was insufficient evidence to justify a hearing.

[49] In that regard, I agree with counsel for the respondents that 4:30 a.m. would not be an unreasonable hour at which to execute a search under section 138 of the ***Liquor Control Act***, when police noted persons drinking something within the licenced premises at that hour. It appears to be admitted, on behalf of the applicant, that patrons were drinking pop or soda. Assuming that to be true, officers would not have been aware of what was being consumed or served, observing the scene from the outside. It is what they claim to have seen and what the applicant alleges took place thereafter, up to and including the arrest and detention of the applicant and others, which opens unresolved questions under the ***Law Enforcement Review Act***, as to the propriety of police conduct, within the meaning of section 29, clauses (a)(i), (ii), (iii), (iv), and clause (b) thereof. Those questions may be resolved only by a hearing at which the evidence may be properly scrutinized.

Findings

[50] The Act places the burden of proof upon the applicant to show that the Commissioner erred in declining to take further action on the complaint. In this case, the applicant has satisfied that burden.

[51] The Commissioner erred by declining to take further action, without first exploring the possibility of settlement under section 15(1).

[52] The Commissioner erred in that he exceeded his jurisdiction by deciding material disputed facts instead of referring the case for hearing, and erred, therefore, in not referring the case for hearing.

[53] The Commissioner failed to accord procedural fairness (a) by failing to arrange for an interview with the applicant, as he had done respecting the respondents, and (b) by failing to disclose to the applicant the contents of the investigator's interview with the respondents, so as to provide the applicant with an opportunity to respond before the Commissioner made his decision.

[54] By reason of those failures, the Commissioner did not have an adequate basis upon which to be satisfied,

(a) that the complaint was frivolous or vexatious, or did not fall within the scope of section 29;
(b) that the complaint had been abandoned;
(c) that there was insufficient evidence supporting the complaint to justify a hearing.

Those are the only grounds under section 13(1) which mandate the Commissioner to decline to take further action.

Options Open to the Provincial Judge

[55] Section 13(3) of the Act provides that if a provincial judge is satisfied that the Commissioner erred in deciding not to take further action on the complaint, he or she shall order the Commissioner to refer the complaint for a hearing or to take such other action under the Act, respecting the complaint, as the provincial judge directs. Short of ordering the Commissioner to refer the complaint for hearing by a provincial judge, counsel submitted that the judge may send the case back to the Commissioner to review the complaint once again, presumably acting within and in accordance with his jurisdiction.

The denial of procedural fairness in the initial investigation, however, suggests a bias. I do not assert that the Commissioner was biased in his conduct of the review, but the appearance of bias remains. In the light of that perception, it would be inappropriate to remit the case back to the Commissioner for another review.

The Order

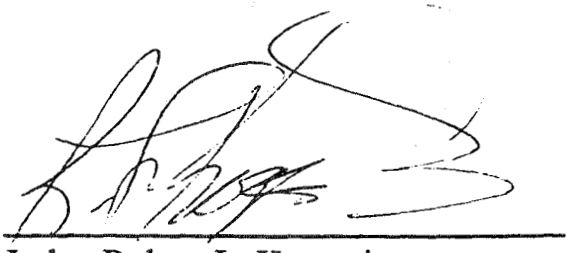
[56] I order the Commissioner to refer the complaint to a provincial judge for hearing.

[57] In accordance with section 13(4.1), I further order:

(a) that no person shall cause the respondents' names to be published in a newspaper or other periodical publication, or broadcast on radio or television until the judge has determined the merits of the application;

(b) that if the application is dismissed by the judge hearing the complaint on its merits, the ban on publication of the respondents' names shall continue; and

(c) that if the application before the judge hearing the complaint on its merits is successful, the ban on publication of the respondents' names shall continue until the complaint is disposed of in accordance with the ***Law Enforcement Review Act.***



Judge Robert L. Kopstein